

## Message Text

PAGE 01 STATE 195631

45

ORIGIN L-03

INFO OCT-01 SCA-01 JUSE-00 COME-00 ARA-16 ISO-00 EB-11

RSC-01 /033 R

DRAFTED BY L/ARA:TABOREK/L/M/SCA:JABOYD:MA

APPROVED BY L/M/SCA:KEMALMBORG

ARA/CAR:JWSIMMS

L/ARA:DAGANTZ (SUB)

----- 125114

O 021823Z OCT 73

FM SECSTATE WASHDC

TO AMEMBASSY PORT AU PRINCE IMMEDIATE

LIMITED OFFICIAL USE STATE 195631

E.O. 11652: N/A

TAGS: PFOR, PGOV, EFIN, HA

SUBJECT: BYERS/AEROTRADE SUIT AGAINST GOH

REFS: (A) PORT AU PRINCE 1671; (B) PORT AU PRINCE 1680

1. DEPARTMENT HAS BEEN PROVIDED BY AEROTRADE REPRESENTATIVE WITH COPIES OF COMPLAINT AND ATTACHMENT ORDER IN SUBJECT SUIT ON INFO BASIS, AND WE HAVE REVIEWED SAME. WITH REGARD TO GOH REQUEST PARA 3 REF (B), GOH SHOULD BE INFORMED BY EMBASSY IN APPROPRIATE MANNER THAT DEPARTMENT CANNOT QTE INTERVENE UNQTE WITH COURT ON BEHALF OF FOREIGN GOVERNMENT TO PREVENT SUIT AND THAT FOR GOH TO PROTECT ITS INTERESTS IT IS IMPERATIVE REPEAT IMPERATIVE THAT IT RETAIN COMPETENT US COUNSEL ASAP TO ADVISE IT ON HOW BEST TO DEFEND SUIT AND TO LIFT ATTACHMENT ORDER AND TO REPRESENT IT IN DISTRICT COURT.

2. WITH REGARD TO SOVEREIGN IMMUNITY ISSUE, USG FOLLOWS QTE RESTRICTIVE UNQTE THEORY OF SOVEREIGN IMMUNITY AS-SET FORTH IN TATE LETTER OF MAY 1952, REPRINTED IN

LIMITED OFFICIAL USE

LIMITED OFFICIAL USE

PAGE 02 STATE 195631

VOL. 6 WHITEMAN'S DIGEST OF INTERNATIONAL LAW P. 569-571, WHICH EMBASSY LIBRARY MAY HAVE (COPY BEING POUCHED TO EMBASSY FOR INFORMATION OF GOH). THAT IS, IMMUNITY IS RECOGNIZED AS EXTENDING ONLY TO SOVEREIGN OR PUBLIC

ACTS AND NOT TO ACTS OF ESSENTIALLY PRIVATE CHARACTER, E.G. COMMERCIAL ACTIVITIES OR AGREEMENTS. ESTABLISHING WHETHER OR NOT A BANK ACCOUNT HAS A PRIVATE OR PUBLIC CHARACTER CAN PROVE TO BE DIFFICULT IF SUCH AN ACCOUNT IS BEING USED FOR SEVERAL PURPOSES AT ONE TIME. SUCH DETERMINATIONS ARE MADE ONLY ON A CASE BY CASE BASIS.

3. COUNSEL FOR THE FOREIGN STATE MAY OFFER THE DEFENSE OF SOVEREIGN IMMUNITY BY ATTEMPTING TO PROVE TO THE COURT THE PUBLIC CHARACTER OF THE SUBJECT MATTER, I.E. THE BANK ACCOUNT, OR BY REQUESTING THE USG TO MAKE A SUGGESTION OF SOVEREIGN IMMUNITY TO THE COURT IN BEHALF OF THE FOREIGN STATE. IF SUCH A REQUEST IS MADE, THE USG DECIDES WHETHER OR NOT A SUGGESTION IS WARRANTED IN ACCORDANCE WITH ESTABLISHED PROCEDURE SUMMARIZED AS FOLLOWS (A COPY OF THE PROCEDURES IS BEING POUCHED): THE EMBASSY OF THE GOVERNMENT CONCERNED ADDRESSES A DIPLOMATIC NOTE TO THE DEPARTMENT SETTING FORTH THE NAME OF THE CASE, GENERALLY ACCOMPANIED BY A LEGAL MEMORANDUM EXPRESSING THE RELEVANT FACTS IN THE CASE AND ARGUMENTS SUPPORTING THE CLAIM OF IMMUNITY. THE DEPARTMENT THEN NOTIFIES THE PLAINTIFF IN THE CASE BY TRANSMITTING A COPY OF THE FOREIGN GOVERNMENT'S NOTE AND MEMORANDUM AND BY OFFERING THE PLAINTIFF AN OPPORTUNITY TO PRESENT VIEWS CONCERNING THE REQUEST FOR IMMUNITY FOR CONSIDERATION. THE DEPARTMENT WILL THEN SCHEDULE A HEARING FOR THE PURPOSE OF ORAL PRESENTATION-OF OPPOSING POSITIONS IF EITHER PARTY SO DESIRES. IF THE REQUEST IS FOUND BY THE DEPARTMENT AFTER SUCH A REVIEW TO BE MERITORIOUS, THE DEPARTMENT WILL MAKE A QTE SUGGESTION UNQTE TO THE COURT THROUGH THE DEPARTMENT OF JUSTICE. IN THE EVENT THAT SUCH A SUGGESTION IS MADE, COUNSEL FOR THE FOREIGN STATE MUST MOVE THE COURT TO REMOVE THE ATTACHMENT ON THE BASIS OF THE DEPARTMENT'S SUGGESTION. (ALTHOUGH A DEPARTMENT QTE SUGGESTION UNQTE IS NOT ABSOLUTELY BINDING ON THE LIMITED OFFICIAL USE LIMITED OFFICIAL USE

PAGE 03 STATE 195631

COURT, THERE APPEAR TO BE NO CASES WHERE IT HAS NOT BEEN ACCEPTED.) IF THE DEPARTMENT DOES NOT FIND THAT SUCH A QTE SUGGESTION UNQTE IS WARRANTED, BOTH PARTIES ARE SO INFORMED, AND THE FOREIGN STATE MAY RAISE THE DEFENSE OF SOVEREIGN IMMUNITY TO THE COURT THOUGH THE COURT MAY FAVOR DENYING SUCH A DEFENSE AFTER THE DEPARTMENT HAS REFUSED TO MAKE A SUGGESTION.

4. EMBASSY SHOULD APPRISE GOH OF FOREGOING PROCEDURES, MAKING CLEAR THAT IN SOVEREIGN IMMUNITY CASES DEPARTMENT'S ONLY REPEAT ONLY CONCERN IS WITH QUESTION OF IMMUNITY AND NOT REPEAT NOT WITH MERITS OF UNDERLYING LITIGATION.

EMBASSY SHOULD ALSO EMPHASIZE THAT IF ATTACHED ASSETS ARE DETERMINED TO BE OF A COMMERCIAL AS OPPOSED TO SOVEREIGN CHARACTER, THE DEPARTMENT IN KEEPING WITH THE RESTRICTIVE THEORY OF SOVEREIGN IMMUNITY WILL NOT MAKE A SUGGESTION OF SOVEREIGN IMMUNITY TO THE COURT. IN ADDITION, GOH SHOULD BE MADE AWARE THAT, IN GENERAL, ISSUE OF SOVEREIGN IMMUNITY IS RAISED INITIALLY IN FORM OF QTE AFFIRMATIVE DEFENSE UNQTE BY ATTORNEY FOR FOREIGN GOVERNMENT IN COURSE OF COURT PROCEEDINGS IN LAWSUIT, THAT FOREIGN GOVERNMENT IS GENERALLY REPRESENTED BY COUNSEL IN IMMUNITY PROCEEDINGS IN DEPARTMENT, AND THAT CONSEQUENTLY EMBASSY CANNOT APPROPRIATELY DO MORE AT THIS STAGE THAN INFORM GOH OF ABOVE ESTABLISHED PROCEDURE AND URGE STRONGLY THAT GOH RETAIN COUNSEL TO REPRESENT IT IN ALL ASPECTS OF LITIGATION AT EARLIEST OPPORTUNITY. THOUGH DEPARTMENT HAS ATTEMPTED TO DESCRIBE BRIEFLY IN THIS CABLE THE VARIOUS OPTIONS AVAILABLE, DEPARTMENT IS UNABLE TO OUTLINE ALL POSSIBLE CIRCUMSTANCES AND ISSUES WHICH MAY ARISE. THIS AGAIN EMPHASIZES THE NECESSITY FOR GOH TO RETAIN LEGAL COUNSEL.

5. SHOULD GOH PURSUE REQUEST REF (A) FOR EXPLANATION OF QTE LEGAL IMPLICATION UNQTE OF AUGUST 21 ATTACHMENT ORDER, EMBASSY MAY RESPOND ALONG FOLLOWING LINES: ALTHOUGH WE HAVE NO REPEAT NO VIEW ON MERITS OF CASE, IT APPEARS THAT PLAINTIFF HAS USED DEVICE OF ATTACHMENT TO ACHIEVE WHAT IS KNOWN AS QTE QUASI-IN-REM UNQTE JURISDICTION OVER NON-RESIDENT DEFENDENT THROUGH SEIZURE LIMITED OFFICIAL USE LIMITED OFFICIAL USE

PAGE 04 STATE 195631

OF SUCH PROPERTY OF DEFENDENT AS MAY BE FOUND WITHIN JURISDICTION OF COURT ISSUING ORDER AND THAT, IN CASES OF THIS TYPE, IT BECOMES INCUMBENT UPON DEFENDENT TO COME INTO COURT EITHER TO CHALLENGE JURISDICTION OF COURT OR TO DEFEND ON MERITS, OR ELSE DEFENDENT RISKS ADVERSE JUDGMENT IN FAVOR OF PLAINTIFF UP TO, BUT NOT IN EXCESS OF, VALUE OF ATTACHED PROPERTY.

6. DEPARTMENT REQUESTS EMBASSY TO MAKE PRELIMINARY INQUIRY OF GOH WITHOUT RAISING ANY HOPES AS TO THE PURPOSE FOR WHICH THE ATTACHED BANK ACCOUNT IS USED. IS THE BANK ACCOUNT USED FOR THE PURPOSE OF PAYING SALARIES FOR HAITI'S PERMANENT MISSION TO THE U.N. OR THE HAITIAN CONSUL GENERAL IN NEW YORK? IF SUCH INFORMATION CANNOT BE GAINED WITHOUT RAISING GOH EXPECTATIONS, DO NOT MAKE SUCH INQUIRY.

7. DEPARTMENT WOULD BE GLAD TO HAVE DEPARTMENT LAWYER MEET WITH GOH EMBASSY REPRESENTATIVE IN WASHINGTON TO EXPLAIN FURTHER THE PROCEDURES REGARDING SOVEREIGN

IMMUNITY. IF EMBASSY REPRESENTATIVE WERE TO MEET WITH  
DEPARTMENT LAWYER, DEPARTMENT COULD FURNISH ADDITIONAL  
LEGAL MATERIALS TO GOH. KISSINGER

LIMITED OFFICIAL USE

<< END OF DOCUMENT >>

## Message Attributes

**Automatic Decaptioning:** X  
**Capture Date:** 11 MAY 1999  
**Channel Indicators:** n/a  
**Current Classification:** UNCLASSIFIED  
**Concepts:** n/a  
**Control Number:** n/a  
**Copy:** SINGLE  
**Draft Date:** 02 OCT 1973  
**Decaption Date:** 01 JAN 1960  
**Decaption Note:**  
**Disposition Action:** RELEASED  
**Disposition Approved on Date:**  
**Disposition Authority:** collinp0  
**Disposition Case Number:** n/a  
**Disposition Comment:** 25 YEAR REVIEW  
**Disposition Date:** 28 MAY 2004  
**Disposition Event:**  
**Disposition History:** n/a  
**Disposition Reason:**  
**Disposition Remarks:**  
**Document Number:** 1973STATE195631  
**Document Source:** ADS  
**Document Unique ID:** 00  
**Drafter:** L/ARA:TABOREK/L/M/SCA:JABOYD:MA  
**Enclosure:** n/a  
**Executive Order:** N/A  
**Errors:** n/a  
**Film Number:** n/a  
**From:** STATE  
**Handling Restrictions:** n/a  
**Image Path:**  
**ISecure:** 1  
**Legacy Key:** link1973/newtext/t19731066/abqceivi.tel  
**Line Count:** 168  
**Locator:** TEXT ON-LINE  
**Office:** ORIGIN L  
**Original Classification:** LIMITED OFFICIAL USE  
**Original Handling Restrictions:** n/a  
**Original Previous Classification:** n/a  
**Original Previous Handling Restrictions:** n/a  
**Page Count:** 4  
**Previous Channel Indicators:**  
**Previous Classification:** LIMITED OFFICIAL USE  
**Previous Handling Restrictions:** n/a  
**Reference:** (A) PORT AU PRINCE 1671; (B) PORT AU PRINCE 1680  
**Review Action:** RELEASED, APPROVED  
**Review Authority:** collinp0  
**Review Comment:** n/a  
**Review Content Flags:**  
**Review Date:** 23 JAN 2002  
**Review Event:**  
**Review Exemptions:** n/a  
**Review History:** RELEASED <23-Jan-2002 by willialc>; APPROVED <19 FEB 2002 by collinp0>  
**Review Markings:**

Declassified/Released  
US Department of State  
EO Systematic Review  
30 JUN 2005

**Review Media Identifier:**  
**Review Referrals:** n/a  
**Review Release Date:** n/a  
**Review Release Event:** n/a  
**Review Transfer Date:**  
**Review Withdrawn Fields:** n/a  
**Secure:** OPEN  
**Status:** NATIVE  
**Subject:** BYERS/AEROTRADE SUIT AGAINST GOH  
**TAGS:** PFOR, PGOV, EFIN, HA  
**To:** PORT AU PRINCE  
**Type:** TE  
**Markings:** Declassified/Released US Department of State EO Systematic Review 30 JUN 2005